

State of Wisconsin



GARY R. GEORGE
SENATOR

MEMORANDUM

TO: Members, Senate Committee on Judiciary and Consumer Affairs

FROM: Dan Rossmiller, Committee Clerk
Senate Committee on Judiciary and Consumer Affairs

DATE: March 30, 1999

RE: Clearinghouse Rules That Have Been Recently Referred to the
Senate Committee on Judiciary and Consumer Affairs

Attached please find a copy of Clearinghouse Rule 98-117, relating to home solicitation selling and a copy of Clearinghouse Rule 98-130, relating to child support administrative enforcement.

These rules were recently referred to the Senate Committee on Judiciary and Consumer Affairs.

Please feel free to contact our office if you have any questions.

Executive Session—April 30, 1999

Questions for DATCP regarding Clearinghouse Rule 98-117:

Background

This rule (ATCP 127) is being repealed and recreated. The principal complaint raised against the rule is that it narrows the scope of protection afforded to consumers. Here's how:

The old rule specifically covers selling where the sale, lease or offer is either personally solicited or consummated by a seller away from the seller's regular place of business. The old rule does not specifically define "solicitation."

The proposed rule does not distinguish between solicitation and consummation. However, it defines "solicitation" as:

"a communication received by a consumer at a place other than the seller's regular place of business, in which the seller offers or promotes the sale of consumer goods or services to a consumer, or which is part of a seller's plan or scheme to sell consumer goods or services to a consumer."

Note: The Assembly Consumer Affairs Committee has scheduled this rule for a public hearing on May 5th.

Questions

Question #1

The definition of "solicitation" in the new rule provides coverage whenever a communication is received by a consumer at a place other than the seller's regular place of business.

- Is it the Department's position that all aspects of the transaction are covered?
- Is the scope of protections to the consumer limited in any way under the new rule compared to the old rule?

Question #2

The definition of "seller" (see p. 20) excludes financial institutions except "credit unions." Please explain.

Question #3

The definition of "seller" in the new rule (see p. 20) removes "suppliers or distributors if they are affiliated with the seller."

- Why was this change made?
- What was in the original rule?

Question #4

The portion of the rule dealing with telephone solicitations (see page 24) not only allows telemarketers to use fictitious names but appears to allow them to use more than one fictitious name.

- Why allow the use fictitious names?
- Why allow the use of more than one fictitious name?

Question # 5

The section of the rule regarding prohibited practices by telemarketers (see p. 33 at (5)) prohibits a seller from requesting or receiving payment for seeking or arranging to seek a loan or extension of credit until the consumer actually receives that loan or extension of credit, if the seller has represented that efforts to obtain a loan or extension of credit would likely be successful.

- Does this imply that if the seller makes no representation at all, the seller could request the fee up front? If so, why?

Question #6

The section of the rule regarding recordkeeping by telemarketers (see p. 33) allows duplicate copies of substantially identical documents to be discarded.

- Who determines what records are kept or discarded?
- Who decides what “substantially identical” means?



State of Wisconsin
Tommy G. Thompson, Governor

Department of Agriculture, Trade and Consumer Protection
Ben Brancel, Secretary



April 21, 1999

The Honorable Gary George, Chairperson
Senate Committee on Judiciary and Consumer Affairs
Room 118 South, State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Dear Senator George:

Re: Direct Marketing Rule

I am responding to questions from your Committee Clerk, Dan Rossmiller, about a final draft DATCP rule related to direct marketing. *This rule strengthens and modernizes current rules under ch. ATCP 127.* The rule is supported by the Department of Justice, consumer groups and the affected business community.

Jurisdiction

This rule expands the coverage of the current rules because it would apply to mail solicitations (including e-mail and fax solicitations). The current rule applies to face-to-face and telephone solicitations, but does not apply to mail solicitations. This rule, like the current rule, exempts general advertisements, catalog sales, and sales at a seller's regular place of business. (These exempt transactions are covered by other laws, such as the deceptive advertising law.)

This rule, like the current rule, applies to face-to-face transactions at a consumer's residence, at the seller's transient quarters, or at a place other than the seller's regular place of business. If a sales transaction is initiated by a direct marketing solicitation, this rule clarifies that the entire transaction (contract, sale, billing and delivery) is covered. However, this rule also clarifies that the following transactions are not covered:

- Routine transactions at an established public market, such as a farmer's market.
- Telephone, mail or electronic communications initiated by the consumer (e.g., when you call for a plumber or pizza delivery), unless the contact is part of a direct marketing transaction initiated by the seller (e.g., a consumer's telephone response to a mail sweepstakes offer).

- The delivery, to the consumer's home, of goods or services purchased in a transaction other than a direct marketing transaction (e.g., the routine delivery of furniture or plumbing services).

This rule, like the current rule, requires sellers to make certain opening disclosures in direct marketing solicitations. Like the current rule, it also requires the seller to disclose the sale terms before the consumer makes any purchase commitment. In a mail or face-to-face transaction, the seller must make these disclosures in writing. In a telephone transaction, the seller may make the disclosures orally if the seller confirms in writing according to this rule.

Compared to 1972 (when ATCP 127 was originally adopted), far more sales transactions are conducted by telephone and credit card. The vast majority of these transactions are bona fide transactions. The telephone offers speed and convenience for consumers as well as sellers. This rule updates telephone solicitation rules, including disclosure and confirmation requirements, consistent with accepted business practices and new Federal Trade Commission rules. This rule strengthens, and does not weaken, the protections provided under the FTC rules.

Financial Institutions

This rule does not apply to financial institutions other than credit unions. This does not reflect any effort to "favor" any segment of the financial industry. It merely reflects the scope of the department's jurisdiction under s. 93.01(1m), Stats. Under that statute, the department has regulatory jurisdiction over credit unions, but does not have jurisdiction over other financial institutions.

"Seller" Definition

Under current rules, a "seller" includes suppliers or distributors who effectively control the seller, or who are subsidiaries or affiliates of the seller. The department believes that the new definition of "seller" is at least as broad as the current definition, and is more readily applicable to a variety of different marketing arrangements. The new rule broadly defines "seller" to include any person (individual or organization) who engaged in the business of selling, offering to sell, or promoting the sale of consumer goods or services to consumers. Under the new rule, a "seller" includes all the following:

- A person who accepts payment for a purported sale of consumer goods or services to a consumer.
- An employee or agent of a seller.

- A person who makes home solicitations under arrangement with a seller.

For example, a firm that sells or promotes the sale of consumer goods or services to consumers is a "seller" under the new rule. An independent telemarketing firm that makes telephone solicitations on behalf of that "seller" is also a "seller" under the new rule. Individual employees of the telemarketing firm are also "sellers," under the new rule, when making telephone solicitations to consumers.

Fictitious Names

The proposed rule provisions related to fictitious names are based on FTC telemarketing rules. The rule does not mandate the use of actual names (because of safety and privacy concerns), but does ensure that the name disclosed to the consumer uniquely identifies the individual making the solicitation. An individual seller could conceivably use more than one fictitious name during his or her career. However, each of those names would be uniquely associated with that individual, and no other individual within the sales organization. The rule prohibits misrepresentations by sellers which have the tendency to confuse or mislead consumers, including the same individual posing as different persons holding different positions within an organization.

Loan Arrangers

The proposed rule provisions related to loan arrangers are based on FTC telemarketing rules. The proposed rule provides much greater protection than current rules, which contain no provisions related to loan arrangers. The loan arranger problems which the department and the FTC have identified to date involve loan arrangers who take money from consumers after promising results. The rule addresses that problem. The department does not see a need, at this time, to intrude on other legitimate business transactions. Loan arrangers are also regulated by s. 943.62, Stats., and credit service organizations are extensively regulated by the Department of Financial Institutions under ss. 422.501-506, Stats.

Recordkeeping

The issue of what constitutes a "substantially identical" record may have to be determined on a case-by-case basis, based on the particular records involved. If there is a serious difference of opinion between the department and the seller, a court may decide. In an investigation, the department can evaluate the completeness and accuracy of a seller's records by comparing those records to sales documents and testimony received from consumers and employees.

Honorable Gary George

April 21, 1999

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We believe the proposed Direct Marketing Rule will provide significant new protection for Wisconsin consumers, particularly since it brings within its scope the new methods of conducting commercial transactions by telephone or by electronic mail

Please contact me at 224-4920 if you have any questions.

Sincerely,

A handwritten signature in cursive script, reading "William L. Oemichen".

William L. Oemichen, Administrator
Division of Trade & Consumer Protection

State of Wisconsin



GARY R. GEORGE
SENATOR

April 26, 1999

The Honorable Margaret Farrow
State Senator
Room 106 South, State Capitol
Madison, WI

Dear Senator Farrow:

I want to respond to your request that the Senate Committee on Judiciary and Consumer Affairs carefully review Clearinghouse Rule 98-117, relating to home solicitation selling, and conduct a public hearing or take other action regarding this proposed rule.

In order to preserve the committee's ability to further review this rule, as requested by your office and others, I have written to Secretary Ben Brancel to request that the Department of Agriculture, Trade and Consumer Protection meet with the committee to review the proposed rule. This request will serve to extend the committee's review period for up to 30 additional days (unless the committee waives its jurisdiction over the rule).

At present, we plan to have DATCP staff will meet with committee in conjunction with an executive session we will hold on Friday, April 30, 1999 at noon in Room 201 South East of the State Capitol.

Please feel free to contact me if you have any questions.

Most Sincerely,

A handwritten signature in cursive script that reads "Gary R. George".

GARY R. GEORGE
State Senator
Sixth Senate District

Cc: Senator Joanne Huelsman
Senator Mary Lazich

State of Wisconsin



GARY R. GEORGE
SENATOR

April 23, 1999

The Honorable Ben Brancel, Secretary
Department of Agriculture, Trade and Consumer Protection
2811 Agriculture Drive
Madison, WI 53718-6777

Dear Secretary Brancel:

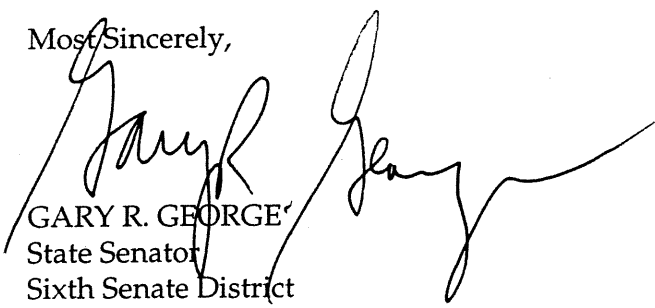
The Senate Committee on Judiciary and Consumer Affairs is currently reviewing Clearinghouse Rule 98-117, relating to home solicitation selling. This rule was referred to our committee on March 25, 1999.

Recently, several Senate offices have requested that we conduct a public hearing or take other action regarding this proposed rule. In order to preserve the committee's ability to further review this rule as requested by those offices, I am writing to you as Chairperson to request that your agency meet with the committee to review the proposed rule. It is my understanding that this request will serve to extend the committee's review period for up to 30 additional days unless the committee waives its jurisdiction over the rule.

Earlier today, my staff contacted Mr. Jim Rabbitt of your Department to inform him that I would be making this request in writing.

Please feel free to contact me if you would like to discuss this request or if you have any questions.

Most Sincerely,


GARY R. GEORGE
State Senator
Sixth Senate District

Cc: Bill Oemichen, Administrator,
Division of Trade and Consumer Protection